MCIS Insurance Bhd v Associated Cover Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1–25–127 OF 1999
KC VOHRAH J
23 MAY 2001

Arbitration *— Award — Setting aside — Application — Arbitrator made an award of liability before award on damages — Whether 'interim award' on liability is a final award — Whether time starts to run from the award of liability — Whether applicant out of time — Arbitration Act ss 15, 23 & 24*

A dispute arose between the Malaysian Co-operative Insurance Society Ltd ('MCIS') and Associated Cover Sdn Bhd ('Associated Cover') on the liability of MCIS to pay commissions under an agreement entered into between them. The dispute was referred by the parties to arbitration. The arbitrator made and published an 'interim award' on liability on 15 April 1995 and directed a continued hearing for the purpose of determining the quantum of claim against MCIS. On 5 November 1999, the arbitrator made and published an award on quantum. On 14 December 1999, MCIS filed an application under ss 23 and 24 of the Arbitration Act 1952 ('the Act") to remit or set aside the 'interim award' and also the other award. Associated Cover made several objections to the application, inter alia, the application should have been filed within six weeks of the date the award was made and published and that the other award in respect of quantum was a separate and distinct award as to liability. MCIS's argument is that the 'interim award' is not a final award but a 'temporary award' and was part of the other award that was made on quantum.

Held, dismissing the application:

(1) The expression 'interim award' appearing in s 15 of the Act is not defined anywhere in the Act. Nor is the expression 'award' defined. Whatever the expression used, whether 'award', 'final award', 'interim award' or 'temporary award' in the context of the law on arbitration, what is important to ascertain is whether it amounts to a decision on the questions referred for determination by the arbitrator. Any form of words amounting to a decision of the questions referred to will be good as an award (see p 567E-F).

(2) A reference to an arbitrator can contain more than one controversy and that unless a contrary intention appears in the arbitration agreement, s 15 of the Act allows an interim award to be made and obviously the interim award can be on one or more of the controversies referred to the arbitrator. If an agreement does not prohibit an interim award from being made or if the agreement to refer a matter to arbitrator in fact specifically provides for an award to be made on a particular controversy (and

calls it an interim award) and another award on the other controversy, if the interim award is made and it has made a decision on the controversy, the interim award then, never mind the label, is final (see p 567A–C); *Juero Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd* [1998] 6 MLJ 545 not followed.

(3) Thus, where there are controversies relating to liability and quantum and an interim award is made on the issue of liability that interim award is final as it is a decision made on part of the controversy, ie liability that was submitted to the arbitrator for his decision. The arbitrator becomes functus officio and cannot revisit the issue of liability when he deals with the other issue of quantum. On the facts, the 'interim award' on liability made and published on 15 April 1995 is a final award as to liability and the application by MCIS made under O 69 r 4 Rules of the High Court 1950 made some four $^{2}/_{3}$ years later is out of time and the application cannot be entertained (see p 569C–D).

[**Bahasa Malaysia summary**

Satu pertikaian telah timbul antara Malaysian Co-operative Insurance Society Ltd ('MCIS') and Associated Cover Sdn Bhd ('Associated Cover') tentang liabiliti MCIS untuk membayar komisen di bawah satu perjanjian yang dimasuki antara mereka. Pertikaian tersebut telah dirujuk oleh kedua-dua pihak kepada penimbangtara. Penimbangtara tersebut telah membuat dan mengumumkan satu 'award interim' tentang liabiliti pada 15 April 1995 dan telah mengarahkan satu sambung bicara bagi tujuan menentukan kuantum tuntutan terhadap MCIS. Pada 5 November 1990, penimbangtara tersebut telah membuat dan mengumumkan satu award berdasarkan kuantum. Pada 14 Disember 1999, MCIS telah memfailkan satu permohonan di bawah ss 23 dan 24 Akta Timbangtara 1952 ('Akta tersebut') untuk meremit atau mengenepikan 'award interim' tersebut dan juga award yang satu lagi. Associated Cover telah membuat beberapa bantahan terhadap permohonan tersebut, antara lain, permohonan tersebut sepatutnya difailkan dalam tempoh enam minggu daripada tarikh award tersebut dibuat dan diumumkan dan bahawa award yang satu lagi berhubung kuantum tersebut adalah satu award yang berasingan dan berbeza berhubung dengan liabiliti. Hujah MCIS adalah bahawa 'award interim' tersebut bukan satu award yang muktamad tetapi satu 'award sementara' dan adalah sebahagian daripada award yang satu lagi yang telah dibuat berdasarkan kuantum.

Diputuskan, menolak permohonan tersebut:

(1) Istilah 'award interim' yang timbul dalam s 15 Akta tersebut tidak ditafsirkan di mana-mana di dalam Akta tersebut. Maupun istilah 'award' ditafsirkan. Apapun istilah yang digunakan, sama ada 'award', 'award muktamad', 'award interim' atau 'award sementara' di dalam konteks undang-undang tentang

timbangtara, apa yang penting untuk ditentukan adalah sama ada ia tiba kepada satu keputusan berhubung persoalan-persoalan yang dirujuk untuk penentuan penimbangtara. Apa-apa bentuk perkataan yang membentuk satu keputusan persoalan-persoalan yang dirujuk adalah sebaik mungkin satu award (lihat ms 567E–F).

(2) Satu rujukan kepada seorang penimbangtara boleh mengandungi lebih daripada satu kontroversi dan jika kecuali satu niat bertentangan timbul di dalam perjanjian timbangtara, s 15 Akta tersebut membenarkan satu award interim dibuat dan dengan jelas award interim tersebut adalah mengenai satu atau lebih kontroversi yang dirujuk kepada penimbangtara tersebut. Jika satu perjanjian tidak menghalang satu award interim dibuat atau jika perjanjian tersebut merujuk kepada satu perkara kepada penimbangtara tersebut dengan jelas sebagaimana khususnya diperuntukkan untuk satu award dibuat berhubung satu kontroversi yang tertentu (dan ia disebut sebagai satu award interim) dan award yang satu lagi berhubung satu kontroversi yang lain, jika award interim tersebut dibuat dan ia telah membuat keputusan tentang kontroversi tersebut, award interim tersebut oleh itu, tidak menghiraukan labelnya, adalah muktamad (lihat ms 567A–C); *Juero Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd* [1998] 6 MLJ 545 tidak diikut.

(3) Oleh demikian, di mana terdapat kontroversi-kontroversi berhubung dengan liabiliti dan kuantum dan satu award interim dibuat berdasarkan persoalan liabiliti bahawa award interim tersebut adalah muktamad memandangkan ia satu keputusan yang dibuat berdasarkan sebahagian daripada kontroversi tersebut, iaitu liabiliti yang dikemukakan kepada penimbangtara tersebut untuk keputusan beliau. Penimbangtara tersebut menjadi functus officio dan tidak boleh mengkaji semula persoalan liabiliti tersebut apabila beliau berurusan dengan persoalan lain berhubung kuantum. Berdasarkan fakta-fakta berikut, 'award interim' tersebut tentang liabiliti dibuat dan diumumkan pada 15 April 1999 adalah satu award muktamad berhubung liabiliti dan permohonan oleh MCIS yang dibuat di bawah A 69 k 4 Kaedah-Kaeda Mahkamah Tinggi 1980 yang dibuat empat $^{2}/_{3}$ tahun lalu adalah di luar had masa dan permohonan tersebut tidak boleh dilayan (lihat ms 569C–D).]

Notes

For cases on setting aside of arbitration award, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 957–979.

Cases referred to

Arbitration between Mohamed Ibrahim & Koshi Mohamed, Re [1963] 29 MLJ 32 (refd)

Juero Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd [1998] 6 MLJ 545 (not folld)
Pegang Prospecting Co Ltd v Chan Phooi Hoong & Anor [1957] MLJ 231 (refd)

Legislation referred to

Arbitration Act 1952 ss 15, 23(1), 24(2)
Rules of the High Court 1980 O 69 r 4(1)

Joginder Singh (*CT Annathurai* with him) (*Hamzah Sulaiman & Partners*) for the applicant.

Christie Soosay Nathan (*S Ragu* with her) (*Christie Soosay Nathan & Assoc*) for the respondent.

KC Vohrah J. : A dispute arose between the Malaysian Co-operative Insurance Society Ltd ('MCIS') and Associated Cover Sdn Bhd ('Associated Cover') on the liability of MCIS to pay commissions under an agreement entered into between them. The dispute was referred by the parties to arbitration.

The arbitrator made and published an 'interim award' on liability on 15 April 1995 and directed continued hearing of the reference for the purpose of determining the quantum of claim against MCIS to a date to be fixed. On 5 November 1999 the arbitrator made and published an award on quantum.

On 14 December 1999, MCIS filed an application under ss 23 and 24 of the Arbitration Act 1952 ('the Act') to remit or set aside the 'interim award' and also the other award. The application was filed within six weeks from the date the other award was made and published.

Under O 69 r 4(1) of the Rules of the High Court 1980, an application to the court —

(a) to remit an award under s 23 of the Act; or

(b) to set aside an award under s 24(2) of the Act or otherwise, may be made at any time within six weeks after the award has been made and published to the parties.

It will be noted that the application is principally to remit or set aside the 'interim award' which had been made and published on 15 April 1995, some four $^{2}/_{3}$ years earlier.

Associated Cover has made several objections to the application, the main one being that the application to set aside the 'interim award' cannot be sustained as it was filed out of time in relation to the said award.

The argument by Associated Cover is that the 'interim award' in the case is in reality a final award in respect of liability and the application should have been filed within six weeks of the date the award was made and published and that the other award in respect of quantum was a separate and distinct award as to liability.

MCIS's argument is that the 'interim award' is not a final award but a 'temporary award' and was part of the other award that was made on quantum and relies on the High Court case of *Juero Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd* [1998] 6 MLJ 545. I have to respectfully disagree with that decision in that case and I will come specifically to that case later.

The 'interim award' sets out the brief facts on the issues to be decided by the arbitrator and for convenience relevant parts of the award are set out as follows:

IN THE MATTER OF AN
ARBITRATION
BETWEEN
ASSOCIATED COVER SDN BHD... CLAIMANT
AND
THE MALAYSIAN CO-OPERATIVE INSURANCE SOCIETY LIMITED ... RESPONDENT

interim award

THIS THE AWARD ... states, finds and awards as follows:

WHEREAS

[1] By an agreement entered into between the respondent of the first part and the claimant of the other part, and dated the 10 January 1987 ('the Kinta Package Agency Agreement'), it was provided by cl 31 thereof that any dispute arising out of or in connection with the agreement shall be referred to the arbitration of two arbitrators (one to be appointed by each of the parties), and an umpire to be appointed by the arbitrators before entering into the arbitration.

[2] A dispute having arisen between the claimant and the respondent, the same was referred by the parties to arbitration

[3] ...

[4] *The claimant and the respondent have agreed that before making a final award in respect of all matters in the reference, there shall be made an interim award on the issue of whether the respondent is liable to the claim made against it in the reference*.

NOW BE IT KNOWN that I ... make and award on the aforesaid issue as follows:

1 I award and determine, for the reasons stated in the reasons for award annexed hereto, that the respondent is liable to pay to the claimant commissions at the rates specified in the schedule of incentives to the Kinta Package Agency Agreement, in respect of:
   (1) all those personal accident insurance policies and householders policies (referred to as the 'Kinta Package' in the Kinta Package Agency Agreement) which had been issued by the respondent before 2 January 1991; and
   (2) all renewals of those policies effected after the said 2 January 1991.

2 *I direct that the continued hearing of this reference, for the purpose of determining the quantum of the claim made against the respondent, be fixed for a date to be determined.*

3 I further direct that the costs of this interim award be reserved and be provides in the final award to be hereafter made.

In witness whereof I have hereunto set my hand this 15 April 1995. **A**

(signed)
Arbitrator
(Emphasis added)

The 'reasons for award' were annexed to the 'interim award' and MCIS seeks in effect to impugn this part (ie the annexure) for being bad in law on the face of it. **B**

MCIS has sought to, inter alia, remit or set aside the 'interim award' under ss 23(1) and 24(2) of the Act.

Section 23(1) reads of the Act: **C**

Power to remit Award

(1) In all cases of reference to arbitration, the High Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire.

(2) …

Section 24(2) of the Act reads: **D**

Removal of arbitrator and setting aside of award.

(l) …

(2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High court may set the award aside. **E**

(3) …

It will be remembered that Recital 4 of the 'interim award' in this case states,

> The claimant and the respondent have agreed that before making a final award in respect of all matters in the reference, there shall be made an interim award on the issue of whether the respondent is liable to the claim made against it on the reference. **F**

It will also be recollected that para 1 of the 'interim award' determined that the liability on the matter raised in the reference was MCIS's and that para 2 directed continued hearing on a date to be fixed to determine the quantum. **G**

Before the Act came into force there was no power to make an interim award in the context of the then existing legislation. Ordinance No 12 of 1950 did not contain s 15 of the Act: see decision of Thomson J (as he then was) in *Pegang Prospecting Co Ltd v Chan Phooi Hoong & Anor* [1957] MLJ 231. **H**

Under the Act, there is nothing which prohibits an interim award from being made by an arbitrator unless a contrary intention is expressed in the arbitration agreement. Section 15 of the Act makes reference to an 'interim award' in these terms

Interim Awards **I**

15 Unless a contrary intention is expressed therein, every arbitration agreement shall where such a provision is applicable to the reference, be

> deemed to contain a provision that the arbitrator or umpire may, if he thinks fit, make an interim award, and any reference in this Act to an award includes a reference to an interim award.

Section 15 of the Act is in pari materia with s 14 of the *English Arbitration Act and Russel on Arbitration* (18th Ed) at p 273 states:

> Power to make more than one award
> An arbitrator can make only one final award, in the absence of some special authority to make more than one. Unless, however, the arbitration agreement expresses a contrary intention, he may make an interim award (s 14) and an interim award may well be final as to some of the claims referred; although it is perhaps more usual for such awards merely to determine certain of the issues arising upon a claim — for instance, to determine the issue of liability while leaving questions of amount to be dealt with later.

If on the other hand '[the] arbitration agreement requires there shall be only a single award ([there] is normally power to make interim awards: s 14) it must be one entire and complete instrument in itself; therefore if it is made part one day and part at another though each and every part is made within the time limited for the award, it will be void (Com Dig Arb E 16).': Russel ibid, 278. Our present 'interim award' does not fall in that category as in fact there is express provision for an interim award to be made on liability and another on quantum.

The expression 'interim award' appearing in s 15 is not defined anywhere in the Act. Nor is the expression 'award' defined. Whatever the expression used, whether 'award', 'final award', 'interim award' or 'temporary award' in the context of our law on arbitration, what is important to ascertain is whether it amounts to a decision on the questions referred for determination by the arbitrator; any form of words amounting to a decision of the questions referred to will be good as an award.

In a Singapore Court of Appeal case, *Re Arbitration between Mohamed Ibrahim & Koshi Mohamed* [1963] 29 MLJ 32, Rose CJ had this to say:

> It is true that the arbitrator described his decision as an order and not an award but when cross-examined by learned counsel for the respondent in this court he said: I made an order and I intended it to be binding on the parties. 'Award' is not a term of art; and it seems to me that the test as to whether an award, be it final or interim, has been made must depend upon whether the order in question amounts to a decision. The principle is stated in the 16th edition of Mr Russels' book on arbitration at p 224: 'any form of words amounting to a decision of the questions referred will be good as an award. No technical expressions are necessary.
> It seems to me that the order of the 25 September does amount to a decision of some of the questions referred and that, although the order is of an interim nature, it nonetheless should be regarded as an 'award'.

A reference to *Halsbury's Laws of Singapore*, Vol 2 at 83, para [20.095] shows clearly the juristic thinking that an award is final in its terms in that in so far as it relates to the issues decided therein it is final whatever one might call the award. The passage reads:

> [20.095] 'Interim', 'partial' and 'interlocutory'
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> The terms 'interim', 'partial' and 'interlocutory' have no statutory definition. All awards are final in their terms in that in so far as relating to the issues decided therein, they are final. In practice, the term 'interim award' is generally used to describe any award that is not final (last) award in the arbitration. Decisions on issues of the applicable proper law, time-bar defences, joinder of parties and arbitral jurisdiction have been described as interim awards, as have awards made on part of the claims only, either on the basis of admission or following a decision of a part only of the issues in dispute. The terms 'partial award' is sometimes used to describe awards on part of the claims only. *An interlocutory award would normally be an award that deals with certain issues such as liability (being final on the issue) leaving quantum to be further assessed.* Partial awards and interlocutory awards could also be termed 'interim awards'. An award dealing with all the issues in the claim and the counterclaim but leaving the issue of costs to be argued is nevertheless often termed an interim award.
>
> (Emphasis added.)

Then again, an 'interim award' used in the sense to describe an award that settles the issue whether there is liability on a claim made under a reference to the arbitrator must also be viewed in the context of the principle that the arbitrator becomes functus officio in respect of the issues disposed off in the award. In connection with this the passage from *Halsbury's Laws of Singapore*, Vol 2, 98 para [20.116] is relevant:

> [20.116] Arbitrator becomes functus officio
>
> A valid award once made is enforceable against the party against whom it is made. If the award is the final award, it terminates the arbitration and extinguishes the original cause of action. The arbitrator becomes functus officio upon making of the final award and cannot alter, add to or make supplementary awards except for clerical or calculation errors. In the case of an interim award the arbitrator becomes functus in respect of issues disposed in the interim award.

I now come to the case relied upon by MCIS, *Juero Development Sdn Bhd*, where the learned judge held at p 551:

> Thus an interim award is a temporary award on the controversy. Since an interim award is regarded as an award by the Act, it is subject to the six-week period prescribed by O 69 r 4(l)(b) of the RHC. The respondent would succeed in his submission if the award on liability is to be treated as an interim award. It is my view that the award that was made on liability was not an interim award. It was a decision on part of the controversy that was submitted to the arbitrator for his decision. It is therefore part of an award. It is not the complete award. It became complete only when the award on damages was also made. This is because it is only at that stage that the arbitrator can be said to have made a decision on the controversy that was submitted to him for adjudication. I therefore hold that the six-week period prescribed by O 69 r 4(l)(b) of the RHC began to run only after the award on damages was made and published. I am therefore unable to agree with the argument advanced by the respondent. The case relied on in support is not relevant as the issue in that case was whether the order made amounts to a decision.

A With respect, I cannot agree with the decision. It is unfortunate that the principles I have referred to were not brought to the attention of the learned judge. What was not considered is that a reference to an arbitrator can contain more than one controversy and that unless a contrary intention appears in the arbitration agreement s 15 of the Act allows an interim award to be made and obviously the interim award can be on one or more of the B controversies referred to the arbitrator. If an agreement does not prohibit an interim award from being made or if the agreement to refer a matter to arbitrator in fact specifically provides for an award to be made on a particular controversy (and calls it an interim award) and another award on the other controversy, if the interim award is made and it has made a C decision on the controversy the interim award then, never mind the label, is final. Thus, where there are controversies relating to liability and quantum, when an interim award is made on the issue of liability that interim award is final as it is a decision made on part of the controversy ie liability, that was submitted to the arbitrator for his decision. In fact having made his award on liability the arbitrator becomes functus officio and cannot revisit the D issue of liability when he deals with the other issue of quantum.

So far as our case is concerned the 'interim award' on liability made and published on 5 November 1999 is a final award as to liability and the application by MCIS made under O 69 r 4 of the RHC made some four $^{2}/_{3}$ years later is out of time and the application cannot be entertained.

E Associated Cover has raised other preliminary objections to the application but in view of my finding that the application has been filed out of time and cannot be entertained, I do not need to consider them.

The application in respect of the interim award is dismissed with costs.

Application dismissed.

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Reported by Benjamin Yong

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